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Cynicism, Reconsidered

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CYNICISM, RECONSIDERED

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Occasionally I encounter among students the suspicion that law is nothing but politics.[1] In the field in which I teach—employment law—this attitude amounts to the cynical belief that if judges (or at least those judges hostile to workers) can possibly find a way for the employee to lose and the employer to win, they will do so. While I must admit my own misgivings about the extent to which doctrine and precedent *actually* decide cases, I push these students to try to understand case outcomes as something other than pure politics. Believing that it is important for law students, as future practitioners, to learn the law as articulated by courts and legislatures, and to master the style of argument they employ, I point out underlying doctrinal structures and highlight the ways in which judicial decision-making, though perhaps not fully determined, is at least constrained. Sometimes, however, it's hard to argue with the cynics. Let me explain.

My Employment Law class begins with a consideration of the at-will rule. Over a century ago, the basic rule governing the employment relationship was established firmly in the common law: in the absence of an agreement of employment for a fixed term, either party is free to terminate the relationship at will.[2] Although the law today forbids certain *bad* reasons for discharge,[3]

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1. Of course, this attitude is nothing new. Critical legal scholars, and the legal realists before them, have argued that law is indeterminate, leaving judges largely free to decide cases based on their own beliefs and value judgments. For a useful summary of the connections between legal realism, critical legal studies and the idea of legal indeterminancy, see John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminancy Argument*, 45 DUKE L.J. 84 (1995).

2. The origins of the at-will rule in this country are commonly traced to an 1877 treatise on the law of Master and Servant: "With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 272 (John D. Parson, Jr., 1877). Although the accuracy of this statement as a summary of the law at that time has been questioned, the at-will rule was widely adopted throughout the United States following the publication of Wood's treatise. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976).

3. A number of statutes place specific limitations on an employer's right to fire, prohibiting, for example, discharges on the basis of an employee's race, color, religion, sex or national origin, Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994); disability, Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994); or age, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994); as well as discharges motivated by retaliation for exercising certain statutory rights, *see, e.g.*, National Labor Relations Act, 29 U.S.C. § 158 (1994). In

the at-will rule retains its vitality, permitting employers to discharge their at-will employees for good cause or no cause without liability, as long as no statutory or public policy restriction has been violated.[4] Because the at-will rule by its own terms is merely a presumption, a persistent question confronting the courts has been what evidence is required to overcome that presumption. One of my purposes in teaching employment law is to trace the courts' evolving responses to this question and their changing willingness to find evidence of a contract binding the employer to something more than an at-will relationship.

In the early part of this century, the application of restrictive contract doctrines made the presumption extremely difficult to overcome.[5] A just cause contract of employment was nearly impossible to create because the law presumed any indefinite term contract to be terminable at will, even in the face of evidence that the parties intended a more permanent relationship.[6] Although some students immediately object to the perceived unfairness of the at-will rule, I suggest that perhaps it was not an unreasonable rule of construction in the context of the late nineteenth and early twentieth century when it first became widely accepted.[7] Throughout this period, worker turnover was extremely high, running up to 200-300% at times.[8] Thus, the judicial presumption of at-will employment mirrored a reality in which employment relationships were in fact unstable and fleeting.

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addition, most states recognize an exception to the at-will rule based on public policy, finding, for example, an employer liable for terminating an employee because he refused to commit an unlawful act. *See* Petermann v. Local 396, Int'l Bd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). *See also* 9A Lab. Rel. Rep. (BNA) 505:51-52 (June 1997).

4. *See, e.g.*, Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985) ("Under Missouri's employment at will doctrine an employer can discharge—for cause or without cause—an at will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for wrongful discharge.") Employment at will is the default rule in every American jurisdiction except Montana, Puerto Rico and the Virgin Islands. *See* MONT. CODE ANN. §§ 39-2-901 to -915 (1995), P.R. LAWS ANN. tit. 29, § 185a (1995); V.I. CODE ANN. tit. 24 §§ 76-79 (1997).

5. *See* Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1097-99 (1984).

6. *See, e.g.*, Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936); Rape v. Mobile & O.R. Co., 100 So. 585 (Miss. 1924). In order for an agreement for "permanent" employment to create an enforceable just cause contract, the employee had to show that he had provided "additional consideration" beyond the work performed. *See, e.g.*, Carnig v. Carr, 46 N.E. 117 (Mass. 1897); Harrington v. Kansas City Cable Ry. Co., 60 Mo. App. 223, 228 (1895). In addition, the doctrine of mutuality of obligation was used to insist that employer and employee be equally bound, so that an employee who was free to quit could not limit an employer to terminating the relationship only for just cause. *See, e.g.*, Meadows v. Radio Indus., Inc., 222 F.2d 347 (7th Cir. 1955).

7. *See* Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 737-40.

8. *See id.* at 738.

After World War II, however, a variety of factors—the growth of unions, the restrictions imposed by New Deal labor legislation and the emergence of personnel professionals—led to the rise of the "internal labor market."[9] Workers no longer constantly competed for available jobs on an open labor market; instead, a worker's career was shaped by incentives within the firm—wage structures, pensions and promotional opportunities that rewarded employee loyalty and longevity.[10] Increasingly, the typical job was not a casual, short-term arrangement, but a career relationship.[11] In this changed labor market context, employees began to argue that the handbooks and personnel manuals issued by their employers created binding contractual obligations that limited the employers' right to discharge at will. Although initially skeptical, the courts became increasingly receptive to this argument.[12] Their shift in attitude was undoubtedly motivated in large part by general concerns of fairness. Recognizing that employers obtained certain benefits from employee reliance on the handbooks they issued,[13] the courts were reluctant to permit employers to later avoid their promises.[14]

As I point out in class, however, concerns of fairness alone would not have been sufficient: the courts also needed to develop a coherent doctrinal rationale for recognizing the provisions of an employee handbook as legally binding. They did so by building on existing contract doctrines.[15] Thus, a

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9. *See id.* at 740-43.

10. *See id.*; PAUL C. WEILER, GOVERNING THE WORKPLACE 63-66 (1990).

11. *See* WEILER, *supra* note 10.

12. The leading cases recognizing that employee handbooks could give rise to binding contractual obligations are: Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Woolley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); and Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

13. Courts have noted the following benefits that accrue to the employer from utilizing an employee handbook: securing "an orderly, cooperative and loyal work force," *Toussaint*, 292 N.W.2d at 892; avoiding unionization, *Woolley*, 491 A.2d at 1264, n.6; establishing uniform personnel policies to ensure fair and consistent treatment, *Thompson*, 685 P.2d at 1087; and creating a "more stable and, presumably, more productive work force." *Pine River State Bank*, 333 N.W.2d at 630.

14. *See, e.g.*, *Woolley*, 491 A.2d at 1266 ("Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses. . . ."); *Toussaint*, 292 N.W.2d at 895 ("Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the workforce, the employer may not treat its promise as illusory.")

15. The requirements of mutuality of obligation and additional consideration which had frequently been utilized to bar just-cause employment contracts in the past, *see supra* note 6, were easily dispensed with as inconsistent with the law of contracts generally. As the courts readily recognized, mutuality in the sense of *equivalent* promises is not essential to a binding contract. *See, e.g.*, Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 443-44 (N.Y. 1982). This principle, as well as the general principle that the law does not inquire into the adequacy of consideration, meant that an employee's labor could support both the employer's obligation to pay wages *and* its promise not to terminate without cause. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 386 (Cal. 1988).

number of courts have held that an employee handbook may be enforced as a unilateral contract.[16] Under this theory, the handbook is viewed as the employer's offer of employment under the specified conditions.[17] Once the handbook terms have been communicated to the employees by its dissemination, their continued labor, when they are free to quit, constitutes their acceptance of and consideration for the offered terms.[18] An alternative legal theory utilized by some courts focuses on the reasonable expectations of the employee.[19] Where an employee reasonably relies on the employer's promissory statements contained in an employee handbook, those promises will be enforced if necessary to avoid injustice.[20] Utilizing either of these theories, a large majority of the states have found that under certain conditions, the provisions of an employee handbook give rise to binding contractual obligations.[21]

The Supreme Court of Missouri first confronted this issue in 1988 in *Johnson v. McDonnell Douglas Corp.*[22] Fired after nine years of employment with McDonnell Douglas, Sherrill Johnson sued her former employer alleging that her termination breached an employment contract, as set forth in the company's employee handbook. In addressing Johnson's claims, the Missouri Supreme Court eschewed the more expansive contract doctrines adopted in other jurisdictions, holding instead that the handbook did not give rise to a binding contract.[23] Adhering to a formalistic view of contracts, the court looked for the "essential elements" of "offer, acceptance and bargained for consideration," and summarily concluded that "[n]one of these elements are present in this case."[24] Finding that the employer's "unilateral act of publishing its handbook was not a contractual offer," it held that the handbook was "merely an informational statement of McDonnell's self-imposed policies. . . ."[25] Noting the general language used in the handbook,

16. *See* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L. J. 326, 340-43 (1991/1992).

17. *See Pine River State Bank*, 333 N.W.2d at 626-27.

18. *Id.*

19. *See* Befort, *supra* note 16, at 343-45. As articulated in the Restatement: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

20. *See, e.g.*, Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984).

21. Of the states that have expressly considered the issue, 35 have found that employee handbooks may give rise to a contract under certain circumstances. Only six have rejected that possibility. *See* 9A LAB. REL. REP. (BNA) 505:51-52 (June 1997).

22. 745 S.W.2d 661 (Mo. 1988).

23. *See id.* at 663.

24. *Id.* at 662.

25. *Id.*

and the fact that its provisions were expressly subject to change at any time, the court concluded that "a reasonable at will employee could not interpret its distribution as an offer to modify his at will status."[26]

Although *Johnson* departs from the weight of authority on the issue, I generally include a discussion of the case in my Employment Law class. One obvious reason is that it states the law in our home state. But the case also demonstrates an alternative view of the legal status of employee handbooks, a contrasting approach to contract law from that taken in other jurisdictions. Whether or not one favors the legal enforcement of handbook provisions, it is difficult to say that either line of cases is "wrong" in any objective sense. Changing social conditions presented a novel issue to the courts. Past precedents pointed in conflicting directions, leaving judges substantially free to choose which precedents to apply when first confronting the issue. As I argue to my students, however, this initial indeterminacy does not necessarily mean that adjudication is purely a matter of the judge's preferences. Once the highest court in a state has interpreted the legal significance of an employee handbook, certain arguments are thereafter foreclosed. Future decisionmaking is constrained by the court's prior choices. Thus, it seemed clear after the decision in *Johnson* that, at least in Missouri, employee handbooks do not give rise to binding contractual obligations.[27]

A recent case has made it more difficult to defend the notion of constrained decision-making against the cynics. In *Patterson v. Tenet Healthcare, Inc.*,[28] the Eighth Circuit considered a lawsuit filed by Deborah Patterson, alleging that her former employer had unlawfully discriminated and retaliated against her in violation of Title VII of the Civil Rights Act of 1964 and the Missouri Human Rights Act. The employer argued that Patterson was contractually bound by a mandatory arbitration clause contained in an employee handbook, and that her suit should be barred. Acknowledging that its decision turned on Missouri contract law, and that under Missouri law, employee handbooks are generally not considered contracts,[29] the court nevertheless concluded that the arbitration clause found

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26. *Id.*

27. The Missouri courts of appeals have unanimously understood the decision in *Johnson* to mean that the terms of an employee handbook cannot give rise to contractual obligations, even when they relate to matters other than termination, such as salary or expense reimbursement. *See* West Cent. Mo. Reg'l Lodge No. 50 v. Board of Police Comm'rs, 939 S.W.2d 565, 568-69 (Mo. Ct. App. 1997). *See also* Merriweather v. Braun, 792 F. Supp. 659, 663 (E.D. Mo. 1992); Remington v. Wal-Mart Stores, Inc., 817 S.W.2d 571, 577 (Mo. Ct. App. 1991); Hargis v. Affiliated Med. Trans., Inc., 764 S.W.2d 741, 742 (Mo. Ct. App. 1989); Enyeart v. Shelter Mut. Ins. Co., 784 S.W.2d 205, 208 (Mo. Ct. App. 1989); Rapp v. City of Northwoods, 769 S.W.2d 815, 818-29 (Mo. Ct. App. 1989).

28. 113 F.3d 832 (8th Cir. 1997).

29. *See id.* at 835.

in the employee handbook was contractually binding and that dismissal of Patterson's discrimination suit was therefore proper.[30]

A closer look at the circumstances of the case makes the Eighth Circuit's decision in *Patterson* even more remarkable in light of the rule enunciated in *Johnson*. In drafting the handbook, the employer took great pains to emphasize its non-contractual nature. In one section it stated: "[This handbook] is not intended to constitute a legal contract with any employee or group of employees because that can only occur with a written agreement executed by a facility Executive Director and an AMI Senior Executive Officer."[31]

Elsewhere, the handbook made clear that its provisions were "subject to change" and not binding.[32] The company specifically "reserve[d] the right to amend, supplement, or rescind any provisions of this handbook as it deems appropriate in its sole and absolute discretion."[33] Such clear disclaimer language generally is sufficient to defeat any claim that the provisions of an employee handbook are contractually binding, even in states otherwise willing to enforce promises contained in a handbook.[34]

Nevertheless, the Eighth Circuit held that the arbitration clause found in the employee handbook was contractually binding on Patterson, arguing that it was "separate and distinct" from the other provisions of the handbook.[35] The arbitration clause was set forth on a separate page of the handbook and introduced by the heading **"IMPORTANT! Acknowledgment Form."**[36] The text on this page repeatedly emphasized the *non*binding nature of the handbook:

> No written agreement concerning employment terms or conditions is valid unless signed by a facility executive director, and senior officer of AMI, and no written statement or agreement in this handbook concerning employment is binding, since provisions are subject to change, and as all AMI employees are employed on an "at will" basis . . . The company reserves the right to amend, supplement, or rescind

30. *See id.*
31. *Id.* at 834. "AMI" was the predecessor of the defendant Tenet Healthcare, Inc.
32. *Id.*
33. *Id.*
34. *See, e.g.*, Woolley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257, 1271 (N.J. 1985) (if the employer does not want the manual to be binding, "[a]ll that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind . . ."); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984) (employers "can specifically state in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship" to avoid being bound by statements in a manual). *See also*, Befort, *supra* note 16, at 348.
35. *Patterson*, 113 F.3d at 835.
36. *Id.* at 834.

> any provisions of this handbook as it deems appropriate in its sole and absolute discretion.[37]

Immediately following this strong disclaimer language was the arbitration clause:

> I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the **final decision** of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.[38]

According to the court, the "marked transition in language and tone" in the latter paragraph was sufficient to "impart to an employee that the arbitration clause stands alone, separate and distinct from the rest of the handbook."[39] In reaching this conclusion, the court ignored the fact that the separate page signed by the employee gave no indication of its purportedly contractual nature—it was entitled "Acknowledgment Form", not "Contract" or "Arbitration Agreement," and was replete with language disclaiming its enforceability. Thus, the Eighth Circuit's conclusion that a binding contract exists—in the face of the Missouri Supreme Court's clear holding that employee handbooks do not constitute contractual offers—rested solely on a supposedly clear shift in language and tone.

Although the *Patterson* court asserted that the "difference in language used" permits the arbitration clause to be read separately from the rest of the handbook, the arbitration clause, by its own terms, refers to the procedures outlined in the handbook. Because it states: "I agree to submit any complaints to the *published process* . . .,"[40] the arbitration clause cannot be read as an integrated agreement separate from the rest of the handbook. Even more troubling, the arbitration procedures supposedly agreed to are themselves uncertain. The handbook states:

> [although] AMI is committed to accepting the obligation to support and assure access to the binding arbitration procedure for solving disputes . . . [s]ituations may arise from time to time which, in the Company's judgement require procedures or actions different than

37. *Id.*
38. *Id.* at 834-35.
39. *Id.* at 835.
40. *Id.* (emphasis added).

> those described in this document . . . [T]he judgement of management shall be controlling in all such situations.[41]

In addition, the Acknowledgment Form itself states that the company reserves the right to amend the handbook "in its sole and absolute discretion."[42] Thus, the court found an enforceable contract to exist where the terms are uncertain and are subject to change by one party at any time.[43]

Perhaps the Eighth Circuit's tortured reading of Missouri contract law in *Patterson* would have sparked more critical commentary if the ultimate outcome of the case did not seem so commonplace. However, by dismissing Patterson's suit, the Eighth Circuit simply fell in line with the overwhelming majority of courts that have found arbitration agreements to bar individual claims of employment discrimination.[44] From this perspective, the *Patterson* court's strained application of *Johnson* to find a binding arbitration agreement in the contents of an employee handbook can be seen as simply one small step in the general rush by the federal courts to embrace mandatory arbitration of statutory employment discrimination claims. The recent increase in cases involving individual arbitration agreements in the employment context has raised novel and difficult issues of law, even apart from the question of whether a contractual agreement to arbitrate exists.[45]

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41. *Id.* at 834.

42. *Id.*

43. Although parties to a contract may agree that the terms are subject to change in the future, as in the typical credit card agreement, the alleged contract in this case differs in several important respects. Because the language of the employee handbook places no limitation on the employer's right to modify its terms, it appears that Patterson's employer may unilaterally change the arbitration procedures without giving notice to the employee and without providing her any opportunity for objection. As written, the agreement even appears to permit the company to change its procedures for resolving an employment dispute *after* the dispute has arisen.

Another crucial difference between Patterson's situation and that of a credit card holder faced with a change of terms is the availability of ready market alternatives. A consumer given notice of a rise in the interest rate can simply cancel her credit card and apply for a new one from any of a myriad of competing companies at relatively little cost to herself. The employee in Patterson's situation, however, cannot so easily quit her job if she objects to a change in the arbitration procedures, or indeed, even to the imposition of the mandatory arbitration clause itself, without incurring substantial costs. If she is a long-term employee with a great deal invested in a particular firm in terms of seniority and benefits accrued over time, the cost of doing so may well be prohibitive.

44. Since the U.S. Supreme Court signaled its approval of mandatory arbitration of statutory employment claims in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the lower courts have enforced arbitration agreements against individual employees in a wide variety of circumstances, generally deciding unresolved legal issues in favor of arbitration. *See, e.g., infra* note 48.

45. In the *Patterson* case, the court's conclusion that an arbitration agreement existed was merely the first step toward its ultimate conclusion that Patterson's suit was appropriately dismissed by the district court. The court went on to consider whether the Federal Arbitration Act applies and whether statutory discrimination claims are arbitrable. It resolved both of these legal issues in favor of arbitration. *See Patterson*, 113 F.3d at 835-38.

Yet despite strong arguments that the Federal Arbitration Act was never intended to apply to employment contracts[46] and that Congress intended that any waiver of a judicial forum in discrimination cases be made knowingly,[47] almost every court of appeals to address these legal issues has decided them against the individual employees seeking to maintain discrimination suits against their employers in court.[48]

To uncynical eyes, the court of appeals' nearly unanimous resolution of every major legal issue in favor of mandatory arbitration rests on the application of neutral principles of adjudication, not a result-driving judicial preference for arbitration. Still, it is hard to ward off doubts entirely, especially given that the recent judicial enthusiasm for arbitration coincides with a sharp rise in the number of employment cases in the federal courts. Perhaps suggestive of a general mood among judges, District Court Judge Sporkin recently wrote:

> It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions . . . What is

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46. Section 1 of the FAA exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). This exemption has alternatively been interpreted broadly, to exclude from coverage all employment contracts, and narrowly, to exclude only employment contracts of workers whose jobs actually involve transportation. The Supreme Court in *Gilmer* specifically left open the issue of how this exemption should be interpreted. *See* 500 U.S. at 25, n.2. Finkin argues persuasively that Congress intended § 1 of the FAA to exempt all contracts of employment over which it had constitutional authority. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996).

47. *See* Prudential Insurance Co. v. Lai, 42 F.3d 1299, 1304-05 (9th Cir. 1994). Others argue that any waiver of a judicial forum should be made both knowingly *and* voluntarily. *See, e.g.*, Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 36-39 (1996).

48. Virtually every Circuit court to consider the issue since *Gilmer* has chosen to construe the § 1 exemption to the FAA narrowly, and therefore to conclude that the arbitration agreements before them were enforceable. *See, e.g.*, *Patterson*, 113 F.3d at 835-36; Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995). Only the Fourth Circuit, in a much earlier case, has adopted a broad reading of the exemption. *See* United Elec. Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954).

Similarly, most of the courts which have considered the issue have rejected the *Lai* court's holding that waiver of a judicial forum for employment discrimination claims must be made knowingly. *See, e.g.*, Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1475 (N.D. Ill. 1997); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1454 (D. Minn. 1996); Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996).

needed is a better screening mechanism as a pre-requisite for gaining access to this nation's federal court system.[49]

Whether or not recent doctrinal developments favoring arbitration of discrimination claims are linked to judicial frustration with a perceived "flood" of employment cases, these decisions were not made in a legal vacuum, but had to take account of existing principles of contract law. In Patterson's case, this meant that the Eighth Circuit should have been bound by the clear Missouri Supreme Court holding in *Johnson* that the provisions of an employee handbook are *not* contractually binding.

When I first became aware of the *Patterson* case last spring, I considered whether or not to include it among the assigned reading materials the next time I taught Employment Law. I wondered how best to explain the outcome in terms of existing precedent, how the case might be reconciled with the holding in *Johnson*. Unfortunately, all the rules of decision that I could come up with to explain both cases had a decidedly cynical ring. For example: in Missouri, provisions in an employee handbook may contractually bind an employee, but not an employer. Or, statements in an employee handbook granting contractual rights to employees are unenforceable, but statements which take away rights, even statutory rights, are enforceable. Or, whenever possible, decide the case so that the employee loses and the employer wins.

Sometimes, it's hard to argue with the cynics.

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49. Tschappat v. Reich, 957 F. Supp. 297, 299 (D.D.C. 1997).